

BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 2000-0378-C - ORDER NO. 2000-847

OCTOBER 18, 2000

IN RE:	Southeastern Competitive Carriers	)	ORDER DENYING
	Association, NewSouth Communications	)	MOTION TO DISMISS
	Corporation, and TriVergent	)	
	Communications,	)	
		)	
	Complainants/Petitioners	)	
	vs.	)	
		)	
	BellSouth Telecommunications, Inc.,	)	
		)	
	Respondent.	)	
		)	

This matter comes before the Public Service Commission of South Carolina (the Commission) on the Motion of BellSouth Telecommunications, Inc. (BellSouth) to dismiss the Complaint filed by the Southeastern Competitive Carriers Association (SECCA), New South Communications Corporation (New South), and TriVergent Communications (TriVergent) (collectively known as “the three entities”). Because of the reasoning stated below, the Motion must be denied.

On May 30, 2000, BellSouth filed two special promotions with this Commission: (1) the “Welcome Back! Win Back promotion (Win Back) and (2) the Win Back Installation Waiver (Installation Waiver) (collectively, the winback promotions). According to the Complaint of the three entities, the Win Back promotion targets business customers being served by competitive local exchange carriers (CLEC’s). The

proposal was offered June 15, 2000 to September 13, 2000, and proposed to provide discounts of 8% to 18% to former BellSouth customers. The discounts would be available for a period of 90 days and would apply for periods of one to three years. The Installation Waiver is also available to previous BellSouth customers that have switched to a CLEC since June 1, 1998. This portion of the proposal waives all line connection charges associated with service orders for returning customers and is to be offered from June 15, 2000 to June 14, 2001.

The three entities allege that the Win Back service offering is, in effect, a new service, not a "promotion," because of the length of time to which the discounts would apply. Customers responding to the promotion could receive a discount for up to three years. Likewise, the entities state that the Installation Waiver will be available for one year. Thus, the three entities assert that the "promotions" are instead tariffed rates.

The Complaint alleges that BellSouth is abusing its market position through the winback promotions, since they solely target customers of CLEC's. According to the three entities, BellSouth's proposals focus on reducing CLECs' market share, thus undermining the Commission's attempts to promote competition in South Carolina, and discriminating against BellSouth's other customers who are similarly situated, all being in violation of State and Federal antitrust laws.

In addition, according to the three entities, the discounts of up to 18% constitute an abuse of market opposition by having profits from a large group of customers subsidize a small group of customers, and are discriminatory against similarly situated

business customers still served by BellSouth. These businesses cannot participate in the winback promotions.

The three entities opine that the purpose of the promotions is to injure, and perhaps destroy, the competition that now exists in South Carolina, and that the promotions are not, therefore, in the public interest. In summary, the three entities allege that the winback promotions are anticompetitive in nature and an abuse of BellSouth's market position.

In response, BellSouth moves to dismiss the Complaint. BellSouth states that, contrary to being anticompetitive, the winback promotions are the type of competition envisioned by the Telecommunications Act of 1996, and that the Federal Communications Commission (FCC) had discussed "winback" concepts in at least one FCC Order. Further, BellSouth denies that the winback promotions are an abuse of market position, and states that they are part of BellSouth's efforts to compete in the marketplace.

BellSouth further states that because the allegations of the three entities in their complaint do not describe any anticompetitive conduct that is prohibited by the antitrust laws, the antitrust claims should be dismissed as a matter of law.

With regard to the abuse of market position claim, BellSouth states that the three entities statement that the winback promotions are in effect a new service and not a promotion does not state a claim under the provisions of the relevant statute, S.C. Code Ann. Section 58-9-576(B)(5)(Supp. 1999). According to BellSouth, volume and term

discounts are nothing new. BellSouth notes that this Commission has approved numerous contract service arrangements (CSAs) in response to a competitive offer.

BellSouth goes on to point out that it is authorized to provide special promotions to consumers by its General Subscriber Service Tariff, and that the promotions are in full compliance with that section, A2.10. All former BellSouth customers that meet the eligibility criteria have an equal opportunity to participate in the winback promotions. Therefore, in BellSouth's opinion, targeting a promotion to such customers is authorized by the tariff. Further, BellSouth points out that there is no discrimination between customers.

As an additional ground for its Motion to Dismiss, BellSouth alleges that the winback promotions have expired, thus, the complaint is now moot.

SECCA, New South, and TriVergent filed a joint response to the BellSouth Motion to Dismiss. The three entities allege four points: (1) the Motion is an attempt by BellSouth to resurrect its rejected "complaint proceedings" proposed first by it in Docket No. 1999-469-C; (2) the winback promotions filing discriminates among customers in an unreasonable and anticompetitive manner never before approved by this Commission; (3) the FCC Order cited by BellSouth in its Motion does not sanction or approve the type of price discrimination inherent in the winback promotions; and (4) the discrimination allowed under the winback promotions would have a devastating effect on competition. The three entities conclude by stating that the Motion to Dismiss should be denied.

BellSouth's Motion to Dismiss basically states that the Complaint fails to state facts sufficient to constitute a cause of action, which constitutes a Motion analogous to

that described in Rule 12(b)(6), SCRCF. Our South Carolina case law indicates that the granting of such a Motion would be sustained only if the facts alleged in the complaint do not support relief under any theory of law. O’Laughlin v. Windham, 330 S.C. 379, 498 S.E. 2d 689 (Ct. App. 1998). We do not believe that BellSouth has shown this to be the case. In fact, BellSouth’s Motion is more of an Answer to the Complaint than it is a Motion, in that it lays out BellSouth’s defenses and arguments against the allegations of the Complaint. We do believe that the facts alleged in the complaint would support relief grantable by this Commission, at least under the abuse of market power cause of action. Under the case law, for the purposes of the Motion, the tribunal must consider all well pled facts to be true. Justice v. The Pantry, 330 S.C.37, 496 S.E. 2d 871 (Ct. App. 1998), *affirmed as modified*, 335 S.C. 572, 518 S.E. 2d 40 (1999). Since the facts of action pled by the three entities in this case support relief under the abuse of market position theory, for the purposes of the Motion, we must deny said Motion. We believe that this matter should go to hearing, so that we may hear all the evidence. (We take no position at this time as to whether we may grant relief under the antitrust theory.)

We would caution the parties that we are under a mandate to consider all well pled facts to be true only for the purpose of the Motion to Dismiss, however. Obviously, we take no position as to the merits of this case until we have had a full evidentiary hearing, with all parties participating.

Further, our Supreme Court has stated that a novel issue should not ordinarily be decided in ruling on a 12(b)(6) Motion to Dismiss. Garner v. Morrison Knudsen Corp., 318 S.C. 223, 456 S.E. 2d 907 (1995). Clearly, the issue before this Commission in this

case is novel. One of the causes of action presented by the three entities is that BellSouth abused its market position, described as part of a complaint process found in S.C. Code Ann. Section 58-9-576(B)(5)(Supp. 1999). Clearly, this is the first case of its type before this Commission, and it clearly constitutes a "novel" issue. We do not believe that this issue should be disposed of summarily by this Commission on the Motion to Dismiss. Again, we believe that a full and fair hearing should be afforded all parties, so that we can make a reasoned, well-informed decision on this matter.

We also disagree that the Complaint is moot, because the winback promotions have expired. Although the promotions themselves have expired, the discounts and waiver of line connection service order charges extend into the future. The discounts are in effect for one to three years, and the waiver of charges extends into June, 2001. Thus, the features of the winback promotions are not moot.

Accordingly, the Motion to Dismiss is denied, and this matter shall proceed to hearing. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

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Chairman

ATTEST:

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Executive Director

(SEAL)